IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2017] NZIPT 600437**

AT AUCKLAND

Appellant:	**MILNE, Erika**
Respondent:	**The Minister of Immigration**
Before:	Judge P Spiller
Counsel for the Appellant:	J Lee
Counsel for the Respondent:	A Skadiang
Date of Hearing:	22 November 2017
Date of Decision:	23 November 2017

DEPORTATION (RESIDENT) DECISION

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[1] This is an appeal against liability for deportation by the appellant, a 35-year-old citizen of South Africa and a New Zealand resident since 26 March 2002.

THE ISSUE

[2] In broad terms, the appeal requires the Tribunal to consider on the facts whether the appellant has satisfied the Tribunal, on the balance of probabilities, that the information provided in relation to her application for a visa on the basis of which her residence class visa was granted was not fraudulent, forged, false or misleading, and that no relevant information was concealed. If the Tribunal is not so satisfied, it must consider whether the appellant has exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for her to be deported from New Zealand.

[3] The Tribunal grants the appeal on the facts for the reasons that follow. This makes it unnecessary for the Tribunal to consider the appeal on humanitarian grounds.

BACKGROUND

[4] The appellant was born in South Africa in 1982.

[5] On 4 December 2001, from South Africa, the appellant's stepfather (Mr Phillips) lodged a residence application under the 1995 General Skills policy as a principal applicant. Six secondary applicants were also included in this application, being his spouse and five dependent children, one of whom was the appellant.

[6] On 27 February 2002, New Zealand Immigration Service (now called Immigration New Zealand), by way of letter to Mr Phillips, advised that the residence application has been approved in principle.

[7] On 26 March 2002, all applicants were granted resident visas (RVs) and first returning resident visas (RRVs), with the following visa conditions:

(a) The RV stated that the holder may travel to New Zealand and on application may be granted a residence permit, but the holder must not arrive after 26 March 2003.

(b) The RRV stated that the holder may travel to New Zealand and, on application, shall be granted a residence permit, and the RRV would be valid for two years from the date of issue of the original residence permit.

[8] In April 2002, Mr Phillips travelled to New Zealand. In May 2002, all the secondary applicants, excluding the appellant, travelled to New Zealand. They were all granted residence permits (now called visas) on arrival in reliance upon their RVs. Their first RRVs became current (or activated) for two years from the date on which their first residence permits were granted.

[9] On 16 November 2002, the appellant married her husband, Mr Milne, in South Africa. She took her husband's surname at marriage and became Erika Milne.

[10] On 26 March 2003, the appellant's RV expired, as she had failed to travel to New Zealand whilst it was current.

[11] In October 2003, the appellant and her husband decided to spend time with her family in New Zealand, especially her mother, following the stillbirth of the couple's first child.

[12] The appellant's air ticket was booked under her married name, Erika Milne, but she had to carry her South African passport (valid until September 2011), which was still under her maiden name, Erika Bester, to travel overseas. To explain the difference in surname between her passport and flight ticket, the appellant brought her marriage certificate with her to New Zealand.

[13] On 27 October 2003, the appellant and Mr Milne arrived in New Zealand for the first time. When she arrived at the New Zealand border, and prior to being granted any permit or visa, the appellant presented her marriage certificate to the New Zealand Border Officers/Customs Officers to explain the different surnames she had on her travel documents, before being allowed to enter.

[14] On the same date, the appellant was originally granted a three-month, single-entry visitor's permit. She was also granted — in error — a single-entry residence permit at the border. As a result, the appellant's first RRV was made current for two years from the date this first residence permit was (mistakenly) granted. Mr Milne was granted a three-month, single-entry visitor's permit as a South African passport-holder.

[15] On 11 November 2003, the appellant and Mr Milne departed New Zealand and returned to South Africa. The appellant's visitor's permit and her first residence permit lapsed.

[16] On 11 June 2004, Mr Phillips lodged an application for a second and subsequent RRV (indefinite) (IRRV). Every applicant included in the original residence application was included in the IRRV application, including the appellant. The appellant was included because her mother was advised by the Immigration New Zealand Call Centre that the appellant would qualify if the principal applicant qualified for an IRRV.

[17] On 15 June 2004, every applicant in the IRRV application, except the appellant, was granted an IRRV. Mrs Phillips told the appellant to submit her passport to a visa application centre to seek her IRRV, like the rest of the family.

[18] On 15 November 2005, the appellant submitted her passport (in her maiden name) to an Immigration New Zealand branch in London to seek her IRRV. This application failed lodgement requirements as the application fee was incorrect. Her application was returned to her in South Africa.

[19] On 30 March 2006, the appellant again submitted her application for her IRRV. This application was again managed by Immigration New Zealand's London branch. According to its Customer Interaction Notes of 31 March 2006:

> … applicant was a secondary applicant in father's PR application (refer CN 27040472). Father was approved an indefinite RRV in June 2004. As the secondary applicant on a RP appln, applicant is entitled to RRV for same duration as the PA. I have therefore approved an indefinite RRV.

[20] Following a second-person check, the appellant was granted an IRRV (again in error) on 31 March 2006, as a result of the first residence permit that had been granted in error on 27 October 2003.

[21] On 23 January 2008, the appellant, along with Mr Milne and their children, travelled to New Zealand for the second time, to attend her sister's wedding. When the appellant arrived, she repeated the process of October 2003, because she was again travelling on documents with two different surnames — Bester and Milne. The appellant was granted her second residence permit, in reliance upon her IRRV, which was again granted in error.

[22] On 4 February 2008, the appellant and her family returned to South Africa.

[23] On 11 November 2015, the appellant was issued a new South African passport under her married name, Erika Milne.

[24] On 10 February 2016, the appellant applied to transfer her IRRV into her new passport, which became an application for a permanent resident visa (PRV). With this application, the appellant submitted her expired and current passports.

[25] During this application process, the appellant was requested to supply her marriage certificate to Immigration New Zealand to confirm the change of her surname. On 23 March 2016, the appellant supplied her marriage certificate by email.

[26] On 31 March 2016, the appellant was issued a PRV which was endorsed on her current passport.

[27] On 21 November 2016, Mr Milne applied for residence under the Family (Partnership) category, including their six dependent children. This application was sponsored by the appellant as his New Zealand-resident partner.

[28] On 11 January 2017, Mr Milne received a letter from Immigration New Zealand notifying him of the appellant's failure to declare him as her partner prior

to activating her first RRV on 27 October 2003. On the same day, the appellant sent a response to Mr Milne's visa officer, explaining the background to the couple's relationship.

[29] On 1 June 2017, the respondent signed a Deportation Liability Notice in respect of the appellant, and this was served on her on 17 July 2017. The Notice stated that the appellant was liable for deportation on the following grounds:

> 1. Your stepfather Roland Phillips applied for residence under 1995 General Skills policy on 4 December 2001 and included you as a dependent child.
>
> 2. You were issued a residence visa on 26 March 2002. …
>
> 4. You remained in South Africa until 27 October 2003, when you travelled to New Zealand, 'activated' your residence visa, and were granted a residence permit.
>
> 5. On 31 March 2016, you were granted a permanent resident visa.
>
> 6. Immigration New Zealand (INZ) has since been made aware that you were in partnership with Simon Milne prior to travelling to New Zealand and being granted a residence permit, in that you were married on 16 November 2002.
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> 7. Relevant immigration instructions at the time of your residence application stipulated that an individual must be single to be eligible for inclusion on another person's application for residence as a dependent child.
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> 8. Furthermore, section 34G of the Immigration Act 1987 … stipulated that any person applying for a visa or permit was required to advice (sic) INZ of any material change to circumstances that may affect a decision to grant a permit in reliance on the visa for which the application was made.
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> 9. Had INZ been aware of your partnership and marriage with Mr Milne, you may not have been granted a residence permit, as your relationship status meant that you no longer met the requirements of a dependent child.
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> [The Minister has] therefore determined that relevant information was concealed in relation to your application for entry permission. You are therefore liable for deportation under section 158(l)(b)(i) of the Act.

THE APPELLANT'S CASE

[30] The appellant's counsel presented submissions in writing (16 November 2017). Counsel submits that:

(a) The appellant could not have sought a residence permit and activated her first RRV on arrival to New Zealand on 27 October 2003. Her residence permit was granted in error, which led to her first RRV being activated in error. All subsequent IRRVs and PRVs

were granted as a result of an administrative error, and not through concealment of any relevant information or material change in circumstances by the appellant.

(b) The appellant denies having concealed her marital status to Immigration New Zealand prior to being granted a residence permit in error and any subsequent residence class visas. If she had any intention to conceal such information, she would not have presented her marriage certificate to Immigration New Zealand and/or Customs multiple times over the course of the 13-year period between 2003 and 2016.

(c) For the above reasons, the grounds on which the Deportation Liability Notice was issued are not correct and should thus be cancelled.

[31] At the hearing on 22 November 2017, the appellant's counsel submitted that the appellant's permanent resident visa should be valid and retained by her, despite the earlier erroneous grant of residence permits and subsequent residence documents to the appellant. This is in view of the effluxion of time since the grant of these residence documents and her reliance in good faith on them.

THE RESPONDENT'S CASE

[32] On 16 November 2017, the respondent's counsel lodged a memorandum, as follows:

(a) Upon an in-depth review of the file, it has since come to counsel's attention that the respondent will not be able to substantiate the grounds on which the appellant had been made liable for deportation.

(b) Accordingly, the respondent considers it appropriate that the appellant's appeal on the facts should succeed.

(c) On the basis that the Tribunal grants the appellant's appeal on the facts, the respondent acknowledges it may also dispense with its consideration of the humanitarian appeal.

[33] At the hearing on 22 November 2017, the respondent's counsel stated her understanding that the appellant's permanent resident visa was valid and intact,

despite the earlier erroneous grant of residence permits and subsequent residence documents to the appellant.

[34] In written submissions provided by the respondent after the hearing, the respondent's counsel stated that:

(a) the Immigration Act 2009 preserves the appellant's residence, if her appeal is allowed;

(b) the Tribunal does not have jurisdiction to make an order under section 209 of the Immigration Act 2009 in relation to the appellant retaining her resident visa for any subsequent liability, and in any event that would not be appropriate.

STATUTORY GROUNDS

[35] The appellant's liability for deportation arose under section 158(1)(b)(ii) of the Immigration Act 2009 (the Act) on the basis that the Minister considered that relevant information had been concealed in relation to her application for a visa on the basis of which her residence class visa was granted.

[36] The grounds for determining an appeal on the facts against deportation are set out in section 202(ca) of the Act (as amended by section 57 of the Immigration Amendment Act 2015), which provides:

> The Tribunal must allow an appeal against liability for deportation on the facts where,—
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> …
>
> (ca) in the case of an appellant liable for deportation under section 158(1)(b)(ii), the Tribunal is satisfied, on the balance of probabilities, that none of the information provided in relation to the person's, or any other person's application, or purported application, for a visa on the basis of which the residence class visa was granted was fraudulent, forged, false or misleading, and no relevant information was concealed:…

[37] In the present case, the Tribunal must allow the appellant's appeal if she has established, on the balance of probabilities, that no relevant information was concealed in relation to her application for a visa on the basis of which her residence class visa was granted.

ASSESSMENT

[38] The appellant has satisfied the Tribunal, on the balance of probabilities, that none of the information provided in relation to her application for a visa on the basis of which her residence class visa was granted was fraudulent, forged, false or misleading, and that no relevant information was concealed. The Tribunal makes this finding for the following reasons.

[39] First, at the time when the appellant was granted a resident visa as a secondary applicant in her father's application (in March 2002), she qualified as a dependent child (aged 19 years and single). The appellant married eight months later (in November 2002).

[40] Second, the appellant, in all her subsequent dealings with Immigration New Zealand and New Zealand Border Officers/Customs Officers, at no stage concealed the existence of her marriage to her husband. She presented her marriage certificate to the New Zealand authorities in October 2003, January 2008 and March 2016. Significantly, she presented it on arrival in October 2003, prior to her passport being endorsed for the first time with a residence permit. If the giving of that first residence permit can be attributed to anything, the evidence indicates that it was given to the appellant by administrative error. The Tribunal has no reason to doubt the appellant's evidence that, on arrival, she had applied for a visitor's permit only (reinforced by the fact that her husband sought only a visitor's permit). There is no evidence that she applied for a residence permit at all — rather, it appears that it was given to her by an immigration officer who simply misunderstood that her inclusion in her father's earlier application had come to an end (both because of her marriage and because she had not arrived in New Zealand before the required date).

[41] Third, the residence permits and subsequent residence documents that were issued to the appellant from October 2003 onwards were also granted to the appellant in error, because they were given in reliance on the first (erroneous) residence permit. The subsequent erroneous grant of residence permits and residence documents to the appellant were, therefore, also not the result of any concealment of relevant information or material change in circumstances by the appellant. Further, even if there *had* been an obligation to disclose her marriage, the appellant was clear to Immigration New Zealand at all material times about it, because of the need to explain the different name in her passport.

[42] Overall, the Tribunal is satisfied that the appellant has proved, on the balance of probabilities, that she did not conceal relevant information relating to her marriage (or otherwise) when her residence visa was granted.

DETERMINATION

[43] For the reasons given, the Tribunal finds that the appellant has satisfied the Tribunal, on the balance of probabilities, that none of the information provided in relation to her application for a visa on the basis of which her residence class visa was granted was fraudulent, forged, false or misleading, and that no relevant information was concealed.

[44] The Tribunal's finding makes it unnecessary to consider whether the appellant has exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for her to be deported from New Zealand.

[45] The Tribunal adopts the submission of the respondent that the resident visa that the appellant now holds is preserved. The Tribunal directs (pursuant to section 209 of the Act) that Immigration New Zealand take such steps as it considers necessary (if any) to give effect to this decision, on this basis.

[46] The appeal is allowed on these terms.

"Judge P Spiller"
Judge P Spiller
Chair

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Judge P Spiller
Chair